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IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16,799

R. P. ANDERSON, ET AL.,
Appellants,

v.

BRIGADIER GENERAL L. E. SEEMAN,
Division Engineer, Southwest Division, Corps of Engineers, United States Army, et al.,
Appellees.

Appeal from the United States District Court For the Northern District of Texas

APPELLANTS' PETITION FOR REHEARING AND SUPPORTING BRIEF

U. S. COURT OF APPEALS
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APPELLANTS' PETITION FOR REHEARING

R. P. Anderson, et al, appellants, respectfully petition the Court to grant them a rehearing; to set aside the judgment heretofore rendered in this case on February 13, 1958; and to reverse the judgment of the district court; and at all events, to modify the Opinion delivered herein on February 13, 1958, so as to eliminate therefrom the holdings adverse to plaintiffs which are hereinafter complained of.

The Constitutional Questions.

1. By their pleadings plaintiffs assumed the burden of proving that the proposed power increment would yield not a profit but an economic loss, *and* that it would not benefit either flood control or navigation. Besides, plaintiffs thereby assumed the further burden of proving that there is no reasonable basis for contrary findings by Congress. The Court has erred in holding, in effect, that plaintiffs are not entitled to their day in court to prove the facts alleged.

2. The Court's holding that Senate Document 98 "refutes the allegation that Congress could *not* have found that this particular dam would benefit navigation or flood control" implies an incorrect criterion. Senate Document 98 does not refute the charge, supported by averments of facts, that the *power increment* will neither yield a profit nor benefit navigation or flood control. It matters not that despite the power increment the dam may benefit flood control or navigation.

3. The Court has erroneously concluded that the judicial function does not include the power to determine that a given segment of this multipurpose dam has been added for an unconstitutional purpose.

4. The Court's opinion (p. 13) states: "the recommendation of the report on which Congress acted is to the effect that the power of the several dams would make a substantial contribution to the annual charges." If this means that the report states in effect that the power would contribute a substan-

tial *net* profit such interpretation of the report is erroneous.

5. The Court erred in holding that in view of appellants' "pleading" of Senate Document 98 the "allegation that Congress could not find that the top segment of the dam would benefit navigation or flood control is a mere conclusion."

6. The Court erroneously holds, in effect, that affirmance is required because the Court cannot "'exercise a legislative judgment based on a complexity of engineering data,' *Oklahoma v. Atkinson*, *supra*, p. 527, in order to ascertain just what part the top twenty-five feet of the dam contributes to the whole, either by increasing the power generated at its site or in stabilizing the flow to the generating sites down river, which are all part of the same development."

7. The error of the Court in holding that plaintiffs' challenge of the proposed power increment has been authoritatively settled against plaintiffs in *State of Oklahoma v. Atkinson Co.*, 313 U.S. 508.

8. The Court's holding "that the dam and reservoir, as authorized by Congress was not beyond the Congressional power to build" is erroneous.

The Statutory Questions.

(In support of the following grounds, 9-13, we respectfully refer to the argument in support of appellant's petition for rehearing in the companion case of Neches River Conservation District v. General Seeman, et al, No. 16,661).

9. The error of the Court in holding that there is nothing in the Rivers and Harbors Act of 1945 limiting the authorization for construction of McGee Bend dam and reservoir, or conditioning such construction on cooperation with state governments or making it subject to the rights of state governments.

10. The error of the Court in holding that defendants are authorized by the Rivers and Harbors Act of 1945 to proceed with the construction of McGee Bend dam and to control the waters of the Angelina River without first obtaining a permit from the Board of Water Engineers of the State of Texas.

11. The error of the Court in holding that paragraph (b) of the Rivers and Harbors Act of 1945 "is merely a statutory guide for the operation" of McGee Bend dam after construction and that it is not intended that the state determine whether such operation and maintenance conflicts with local beneficial consumptive uses.

12. The error of the Court in failing to hold that the complaint shows a sufficient right in plaintiffs to challenge the actions of defendants as being unauthorized by the statute under which they purportedly are operating.

13. The error of the Court in holding, in effect, that the complaint fails to assert a claim on which relief could be granted.

WHEREFORE, appellants pray that the judgment of this Court entered herein on February 13, 1958, be set aside; that a rehearing be granted, and (a) that the judgment of the District Court be reversed; and (b) at all events that the Opinion delivered herein on the same day be modified so as to eliminate therefrom the holdings adverse to plaintiffs which are complained of herein.

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This petition for rehearing is not filed for purposes of delay, but is presented in good faith and in the belief that it is meritorious and that the assignments of error are well taken.

Ireland Graves

BRIEF IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING

The power of Congress to determine whether the hydro-electric increment shall be included in McGee Bend dam and reservoir is broad, but not unlimited.[1] If the question lies within the realm of judgment or discretion, the process of deciding it is a legislative one and the decision of Congress is perforce conclusive. On that hypothesis, the attempt in *Oklahoma v. Atkinson*, 313 U. S. 508, to invoke the judicial process for an independent re-determination of the questions that had been legislatively decided was rejected. But the rejection was firmly posited on the foundation that the judicial function was not available to overturn or disturb the legislative *judgment*. The Court was at pains to exhibit the circumstances that gave character to the legislative action as an exertion of legislative discretion, and not an exercise of arbitrary power. These were supplied, in main if not wholly, by H. Doc. No. 541 (Report) by which it was demonstrated that the project was adequately supported, legally, on two grounds: First, that, as estimated by the Division Engineer, the power phase would yield an annual profit of $404,310 to apply against an annual deficit from

[1] "The role of the judiciary in reviewing the legislative judgment is a narrow one in any case." *United States v. Twin City Power Co.*, 350 U.S. 222, 224. This implies that even the power of legislative judgment is not limitless. Besides, it is in the realm of *judgment* that the legislative power is so extensive. This is short of *absolute* power.

flood control of $287,000. 313 U. S. p. 520.[2] And, second, "it was plain from the Report that the construction of the project so as to accommodate power will increase or augment some of the flood control benefits, including river flow, which would accrue were the dam to be erected for flood control only." 313 U. S. p. 529.

It can not be gainsaid that since power contributed to flood control benefits (legitimate aids to commerce), the Red River project was sustained as primarily a flood control project. But the Court said also: "We have recently recognized that 'Flood protection, watershed development, *recovery of the cost of improvements through utilization of power* are * * * parts of commerce control.'" (Emphasis supplied). And fifteen years later—two years ago—this was quoted again in *United States v. Twin City Co.*, supra, p. 224.

In *Oklahoma v. Atkinson*, supra, the Court also remarked that the District Engineer stated (in H. Doc. 541, p. 67) that flood control benefits would be augmented by those resulting from regulated power discharge. 313 U. S. p. 530. Appellees in our case cited this as a legal precedent for a similar holding here. But this Court properly refused to transplant the Red River Report into this record. Moreover, S. D. 98 affirmatively recognizes that the power increment at McGee Bend dam would pro-

[2] Allowing full scope for different methods of distributing costs between flood control and other purposes, it was not disputed that, at all events, the power phase of the Denison dam and reservior yielded a net profit.

duce an *irregular flow*, which would need re-regulating at Dam B, on the Neches.[3]

As to the Red River project, Congress having been supplied (by H. Doc. 541) with a two-fold basis for its legislative judgment, no amount of evidence placed before the court at a trial, anew, would have been effective to overturn the action of Congress.

This Court in reaching a decision has taken into account Senate Document 98, as in *Oklahoma v. Atkinson, supra*, the Court considered H. Doc. 541.[4] We think that this in each instance was inescapable. However, we earnestly insist that the Court has erred in concluding (Opinion p. 10) that Senate Document 98 has transformed into *a mere conclusion* —despite the supporting particulars—the allegation "that Congress could not possibly conclude that the top segment of this dam would benefit navigation or

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[3] "In addition to the large dams proposed, [McGee Bend and Rockland] it is desirable to include two small dams downstream for the regulation of the *fluctuating discharges from the generating plants,* and it was found that these dams [A and B] could be justified for power production alone." S. D. 98, p. 36. (Emphasis supplied.) The need of so regulating the fluctuating discharges from the turbines of the large dams is repeated at pages 4, 7, 39, 48, 51, of S. D. 98.

[4] In *Oklahoma v. Atkinson* plaintiff did affirmatively plead H. Doc. 541, bodaciously importing it into its complaint, attaching a copy as an exhibit. In the present case plaintiffs allege that *defendants* are relying, in support of their actions, upon the Rivers and Harbors Act of 1945 (in which Senate Doc. 98 is incorporated by reference). On the statutory issue plaintiffs allege *and* contend that the statute on which defendants rely conditions their right to construct the dam on the issuance of a permit from the Texas Board of Water Engineers, (R. 5, 11, 19). It is respectfully submitted that this does not amount to a "pleading" of S. D. 98 in such a way as to penalize plaintiffs in the manner stated in the Court's opinion.

flood control." The allegation, in context, is this: "The power increment does not contribute to either navigation benefits or flood control benefits. Insofar as it would have any effect at all on flood control or navigation, it would be detrimental *in that* the larger reservoir would tend to increase both the peak flood flow and the total run-off which must be provided for in the design for flood control. There is no reasonable basis for contrary findings." (R. 7, 16, 23; emphasis supplied).

Putting to one side the Court's view that plaintiffs "pleaded" Senate Document 98, and the effect of such pleading as viewed by the Court, we respectfully insist that there simply is no irreconcilable conflict between S.D. 98 and the positive allegations (buttressed by particulars) that the power increment *would not* yield a profit, and *would not* augment flood control or navigation benefits. Senate Document 98 does not refute such allegations.

It will not do to say that the dam, notwithstanding and despite the burden of the power increment, will still benefit flood control and navigation. This does not justify the power increment, a *non*-commerce purpose, unless it is justified in one of the ways mentioned.

This brings us to the Court's holding (p. 13) that the Court "'cannot exercise a legislative judgment based on a complexity of engineering data,' *Oklahoma v. Atkinson, supra*, p. 527, in order to ascertain just what part the top twenty-five feet of the dam contributed to the whole, either by increasing

the power generated at its site, or in stabilizing the flow to the generating sites down river, which are all part of the same development."

This holding presupposes that, as was true of the record in *Oklahoma v. Atkinson*, the record in the present case presents an *issue* of fact, created by a complexity of engineering data, that is susceptible of resolution by an exercise of legislative *judgment*. If that were true, the Court could hardly do other than affirm the judgment on the authority of *Oklahoma v. Atkinson*. But such is not the case. In *Oklahoma v. Atkinson*, plaintiff assailed the Denison Reservoir legislation of 1938 by challenging the correctness of the engineering conclusions as expressed in H. Doc. 541. It tendered an *issue* of fact, seeking findings in conflict with those in H. Doc. 541. The Court, recognizing that this was but an attempt to obtain a judicial revision of an adequately supported legislative decision, simply declined to take jurisdiction. The two basic findings made by Congress have been noted above. Either finding thus supported was not reviewable in court. If in the present case either of these conditions had been met (e. g. by evidence contained in S. D. 98) *Oklahoma v. Atkinson* would have been a precedent for similar disposition of this case. Neither condition was satisfied.

Besides, our pleading is not confined to a charge of the absence of the two factual conditions. It goes further. Anticipating a claim that there was relevant evidence before Congress from sources other than S. D. 98, our complaint charges that there was

no basis of fact *from any source* that could support such Congressional determination. Again, no such allegation is to be found in Oklahoma's pleadings. The reason for its absence is patent: H. Doc. 541 refutes it.

Now, appellants recognize that if the most they are able to achieve on a trial is to present substantial evidence supporting the allegations relied upon, creating no more than an issue of fact tending to support a favorable determination, this will not suffice. Unless we can establish the requisite facts without dispute we shall fail.

Unless we can establish *irrefutably and without dispute* that a given segment of the dam, as planned, will serve power at a loss and not at a profit, without augmenting flood control or navigation benefits, we shall not be entitled to prevail. If, *per contra*, we are able to establish such facts beyond cavil, not depending upon a resolution of complex engineering disputes, but resting upon undisputed and irrefutable evidence, we shall be entitled to prevail.

In seeking an opportunity to discharge this burden plaintiffs present for decision a case that has not been foreclosed against us by *Oklahoma v. Atkinson*, or by any other case that has been cited by appellees or that we have been able to discover.

In the face of plaintiffs' allegations it can not be assumed that the utmost that plaintiffs will be able to establish is an *issue*, engendered by a complexity of engineering data. The plaintiffs' pleadings entitle

them to try their case "on the proofs." *Des Isles v. Evans*, 200 F. 2d 614, 615 (5 Cir.); *De Loach v. Crowley's Inc.*, 128 F. 2d 378, 380 (5 Cir.).

Respectfully submitted,

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The undersigned certifies that a copy of this petition for rehearing and brief in support thereof has been served upon Appellees, by forwarding, by first-class mail, a copy to each of their attorneys of record, namely: Messrs. Perry W. Morton, Assistant Attorney General, Washington, D. C.; Heard L. Floore, United States Attorney, Fort Worth, Texas; David R. Warner and Alfred H. O. Boudreau, Jr., Attorneys, Department of Justice, Washington, D. C.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 122

R. P. ANDERSON, ET AL., PETITIONERS

v.

BRIGADIER GENERAL L. E. SEEMAN, DIVISION ENGINEER, SOUTHWEST DIVISION, CORPS OF ENGINEERS, UNITED STATES ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court is unreported. The opinion of the Court of Appeals is reported at 252 F. 2d 321.

JURISDICTION

The judgment of the Court of Appeals was entered February 13, 1958. Rehearing was denied March 27, 1958. The petition for a writ of certiorari was filed June 23, 1958. The Jurisdiction of the Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Rivers and Harbors Act of 1945 requires that a permit be obtained from the State of Texas as a condition precedent to the construction in Texas by the United States of a dam in navigable waters of the United States.[1]

2. Whether, in the case of federal dams erected primarily in the interests of flood control and navigation, Congress may authorize the generation of hydroelectric power as part of the entire plan.

STATUTE INVOLVED

The pertinent provisions of the Rivers and Harbors Act of 1945, 59 Stat. 10, are set forth in Appendix A to the petition at pages A1–A5.

STATEMENT

This is a suit brought by a number of plaintiffs, petitioners here, whose lands would allegedly be inundated by the construction of McGee Bend Reservoir, to enjoin the taking of their lands for purposes of that reservoir. The reservoir has been authorized by Congress to be constructed at the direction of the Secretary of the Army and under the supervision of the Chief of Engineers. Rivers and Harbors Act of 1945, 59 Stat. 10, 11, 18. The respondents are the Division Engineer of the Southwest Division, Corps of Engineers, and the District Engineer

[1] This question is discussed in respondents' brief in opposition in the companion case of *Neches River Conservation District, Petitioner*, v. *Brigadier General L. E. Seeman, Division Engineer, Southwest Division, Corps of Engineers, United States Army, et al.*, No. 121, to which the Court is respectfully referred.

of the Fort Worth District of that Division. The United States is not a party to this suit.

Petitioners assert that Congress has no constitutional power to authorize the generation of hydroelectric power under the circumstances allegedly here prevailing, i. e., that the generation of power will neither contribute to the improvement of navigation nor the control of floods on the river and, in addition, will prove economically unjustifiable. Because of this, it is said that the Rivers and Harbors Act of 1945, insofar as it authorizes the construction of McGee Bend Dam and Reservoir in accordance with the plan submitted by the Chief of Engineers, is unconstitutional.

In the Rivers and Harbors Act of 1945, 59 Stat. 10, 18, Congress, by adoption of the plans contained in Senate Document No. 98, 76th Congress, 1st Session, which is a report of the Chief of Engineers, authorized the construction of a project of four dams on the Neches-Angelina system. The plans provide for two large dams, one on the Neches River at Rockland and one on the Angelina at McGee Bend (that here at issue) and two smaller reregulating dams on the Neches below Rockland. The basic aims of the project are these:

> * * * First, to control floods from the upper basin, thereby reducing flood losses in the lower valley and benefiting navigation below Beaumont; and second, to regulate stream flow, thereby making available needed water supplies for the area in the vicinity of Beaumont, providing depths in the Neches River above Beau-

mont suitable for shallow-draft navigation, and making possible the development of a substantial block of hydroelectric power. * * *

Since completion of one of the smaller re-regulating dams in 1951, the Congress has appropriated some $5,500,000 for the construction of McGee Bend. (See Public Works Appropriation Bill, House Report No. 1085, adopted in Public Law 163, 84th Congress, 1st Session, and Public Works Appropriation Bill, House Report No. 2413, page 11, adopted in Public Law 641, 84th Congress, 2nd Session.). The most recent action has been the rejection by the House, after debate, of an amendment to the Public Works Appropriation Bill for 1959 which would have eliminated the power feature of McGee Bend Dam. (Cong. Rec., daily ed., June 19, 1958, pages 10635–10637.)

Respondents filed a motion to dismiss, alleging some six separate grounds (R. 25, 27). The motion was granted by the District Court on May 20, 1957. The Court of Appeals, holding that the dam and reservoir, as authorized by Congress, was not beyond the Congressional power to build, affirmed the judgment of dismissal on February 13, 1958.

ARGUMENT

1. This case cannot be distinguished on the facts or the law from *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508. The single factual difference of any note is that, while in that case only one dam was projected, here there are four. Both the Denison Dam there involved and McGee Bend here at issue are multiple-purpose dams and both were authorized basically for

the purpose of flood control.[2] See *Oklahoma* v. *Atkinson Co.*, at 520, 529. On the basis of this Court's decision in that case, as well as in *Arizona* v. *California*, 283 U. S. 423, and *United States* v. *Twin City Power Co.*, 350 U. S. 222, the court below could not have ruled other than it did.

Even the pleadings in these two cases are similar. In this case the complaint alleges that an "additional segment for the purpose of developing hydroelectric power" is "superimposed" (R. 6, 12) or "superadded" (R. 7, 16) "on top of a so-called flood control and water conservation dam" (R. 7, 16). In *Atkinson* the complaint alleged that, under the War Department's survey, the first 110 feet of the dam was to be used for the development "solely and exclusively" of water power, while 40 feet "superimposed" on the power reservoir were to be used "solely and exclusively" for flood control. *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, 513. In both cases the allegations are that different portions of the same dam and reservoir will be dedicated to independent uses.[3] In short, the contention is made here, as it was in *Atkinson*, that the generation of power will not improve navigation or control floods.

In an attempt to distinguish *Oklahoma* v. *Atkinson Co.*, petitioners here allege that "Congress could not

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[2] McGee Bend Dam is to be built also "in the interest of national security and the stabilization of unemployment," (Section 2 of the Rivers and Harbors Act of 1945, 59 Stat. 11, 12), and its construction is therefore also an exercise of the war and general welfare powers of Congress.

[3] Oklahoma picked the lower portion of the dam as its target; here, petitioners pick the top.

possibly conclude" that the generation of power would contribute toward "recovery of the cost of improvements" as would aid flood control or navigation." Petition, page 7. That allegation that "Congress could not possibly conclude" was made in an effort to meet the following language of this Court's opinion in *United States v. Twin City Power Co.*, 350 U. S. 222 at 224:

> The Court of Appeals concluded that the improvement of navigation was not the purpose of the taking but that the Clark Hill project was designed to serve flood control and water-power development. 215 F. 2d at 597. It is not for courts, however, to substitute their judgments for congressional decisions on what is or is not necessary for the improvement or protection of navigation. See *Arizona v. California*, 283 U. S. 423, 455–457. The role of the judiciary in reviewing the legislative judgment is a narrow one in any case. See *Berman v. Parker*, 348 U. S. 26, 32; *United States ex rel. TVA v. Welch*, 327 U. S. 546, 552. The decision of Congress that this project will serve the interests of navigation involves engineering and policy considerations for Congress and Congress alone to evaluate. Courts should respect that decision until and unless it is shown "to involve an impossibility," as Mr. Justice Holmes expressed it in *Old Dominion Co. v. United States*, 269 U. S. 55, 66.

The Court of Appeals applied precisely these principles. It concluded that there was ample basis, as shown by Senate Document No. 98, for concluding that power generation would serve the interests of

navigation and flood control. Petitioners' attempted isolation of the McGee Bend Dam from the rest of the project,[4] their assertions as to power production, and their prediction as to future revenue, all represent merely disagreements with the wisdom of Congress. As the court below said, "The recommendation of the report on which Congress acted is to the effect that the power of the several dams would make a substantial contribution to the annual charges."

2. Since the Rivers and Harbors Act of 1945, properly construed, does not forbid the respondent officers from proceeding to construct the dam without first obtaining the consent of Texas thereto,[5] those officers were acting within the scope of statutory authority, *Larson* v. *Domestic and Foreign Corp.*, 337 U. S. 682, and the suit is in reality one against the United States, which has not waived its sovereign immunity.

Moreover, petitioners cannot show that they will suffer irreparable injury, *United Gas Co.* v. *R. R. Commission,* 278 U. S. 300; *Berman* v. *Parker,* 348 U. S. 26; or that they have no plain, adequate and complete remedy at law, *State of Georgia* v. *City of Chattanooga,* 264 U. S. 472, in the Court of Claims or in condemnation proceedings. Furthermore, where

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[4] "Nor is there a constitutional necessity for viewing each reservoir project in isolation from a comprehensive plan covering the entire basin of a particular river." *Oklahoma* v. *Atkinson Co., supra,* at 525. See also *Berman* v. *Parker,* 348 U. S. 26, 34–35; *United States ex rel. T. V. A.* v. *Welch,* 327 U. S. 546, 552.

[5] See brief in opposition in the companion case of *Neches River Conservation District* v. *Seeman,* No. 121, pp. 7 to 11.

the possibility of raising the constitutional issue in future condemnation proceedings exists; suit for an injunction is premature, *Cavanaugh* v. *Looney*, 248 U. S. 453.

And, again, the Secretary of the Army is an indispensable party. If respondents are enjoined from constructing the dam, his actions will be controlled thereby because he is under a direction to prosecute this project "as speedily as may be consistent with budgetary requirements" (Section 2 of the Rivers and Harbors Act) and either he or a subordinate of his at his direction would then be obliged to take the affirmative action of seeking permission to build from the Texas Board of Water Engineers. But the Secretary is not, and cannot be made, a party to this action, *Blackmar* v. *Guerre*, 342 U. S. 512.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

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JULY 1958.

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